

United States District Court

For The District of Wyoming

UNITED STATES OF AMERICA,

Plaintiff(s),

vs.

WINSLOW FRIDAY,

Defendant(s).

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Case No. 05-CR-260-D

ORDER ON MOTION TO DISMISS INFORMATION

This matter comes before the Court on the Defendant's Motion to Dismiss Information. The Court, having carefully considered the briefs and materials submitted in support of the motion and the government's opposition thereto, having received testimony of witnesses and heard oral argument of counsel, and being otherwise fully advised, FINDS and ORDERS as follows:

Background

On November 15, 2005, Winslow W. Friday, Defendant, was charged by Information with the unlawful taking of one bald eagle without having previously procured permission to do so from the Secretary of the Interior, a misdemeanor in violation of the Bald and Golden Eagle Protection Act (BGEPA), 16 U.S.C. § 668. In support of his motion to dismiss, Defendant contends that the charge violates the free

exercise of religion protected under the First Amendment, as well as the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb et seq.

Defendant maintains that the eagle was taken for religious practices. Defendant is an enrolled member of the Northern Arapaho Tribe ("the Tribe"), as well as a member of the Native American Church. Defendant asserts that, as a practitioner of Native American religion, he took the eagle for use in the Sun Dance for the Northern Arapaho Tribe. He further asserts that he and other members of the Northern Arapaho Tribe in fact participated in the Sun Dance ceremony for which the eagle was taken.

Both the Defendant and the Tribe (participating as Amicus party) explained the significance of the Sun Dance to the religious beliefs of the Arapahoes, which is not disputed by the Government. The eagle parts are an offering to God and are central to the Sun Dance ceremony. Defendant and the Tribe assert that "clean" eagles are required for their ceremonies; eagles that have died as a result of electrocution, vehicle collision, unlawful shooting or trapping, poisoning or from natural causes are unacceptable for ceremonial sacrifice. The Tribe contends that the actual hunting and taking of an eagle is an act of religious belief and is itself entitled to protection under the free exercise clause.

The Government investigation into the eagle taking revealed the following facts. On March 2, 2005, Eddie Friday reported to the Bureau of Indian Affairs Police Department that he had just witnessed someone shoot a bald eagle near his home

located on the Wind River Indian Reservation. Tribal Warden Rawley Friday and Special Agent Roy Brown of the United States Fish and Wildlife Service ("USFWS") began an investigation into the shooting. After observing a truck parked at Keenan Groesbeck's home matching a description provided by Eddie Friday, Warden Friday made contact with Groesbeck, who was with Defendant. Both Groesbeck and Defendant denied any knowledge of the shooting. While at Groesbeck's home, Warden Friday noted the tread pattern on Groesbeck's white, Chevrolet pick-up truck.

Warden Friday went to the site of the shooting where he observed fresh tire tracks that appeared to match the tire tread on Groesbeck's truck. He also saw one set of footprints leaving the tracks from the passenger side of the truck. He tracked the footprints through the fence to the tree where the bald eagle was shot.

A few days later SA Brown spoke with Groesbeck about the shooting. Groesbeck initially denied knowing anything about the bald eagle being shot. Eventually, however, Groesbeck told SA Brown that Defendant had shot a bald eagle and that he had driven Defendant to the kill site. Groesbeck told SA Brown that Defendant gave the tail fan of the eagle to one of the sponsors of the Arapaho Sun Dance. SA Brown subsequently made contact with Defendant who indicated that he shot the eagle for the Sun Dance. Defendant further stated that he had given away all of the parts of the eagle, except the feet, which he kept. There is no record of either Defendant or Groesbeck applying for or receiving any permit to take or possess eagles

or eagle parts. There is also no record of Defendant having applied to receive eagles or eagle parts from the National Eagle Repository.

The BGEPA provides a permitting process for the possession or taking of bald eagles:

Whenever, after investigation, the Secretary of the Interior shall determine that it is compatible with the preservation of the bald eagle or the golden eagle to permit the taking, possession, and transportation of specimens thereof for the scientific or exhibition purposes of public museums, scientific societies, and zoological parks, or *for the religious purposes of Indian tribes*, or that it is necessary to permit the taking of such eagles for the protection of wildlife or of agricultural or other interests in any particular locality, may authorize the taking of such eagles pursuant to regulations which he is hereby authorized to prescribe: . . . *Provided* . . . That bald eagles may not be taken for any purpose unless, prior to such taking, a permit to do so is procured from the Secretary of the Interior

16 U.S.C. § 668a (first emphasis added).

The U.S. Fish and Wildlife Service operates the National Eagle Repository in Commerce City, Colorado. The Repository serves as the main collection point for all salvaged bald and golden eagle carcasses, parts and feathers. It is responsible for the receipt, evaluation, storage and distribution of dead bald and golden eagles, and parts thereof, to enrolled Native Americans of federally recognized tribes throughout the United States for use in their religious ceremonies. Eagles and eagle parts distributed by the Repository come from various sources throughout the United States. The majority of carcasses received are birds found dead and salvaged; some are obtained through law enforcement seizures. Mortalities include electrocution, collisions,

emaciation, gun shot, etc.

The demand for eagle parts far exceeds the supply of salvaged eagles. Requests for whole birds are filled in approximately 3 to 3½ years. Orders for the tail or tail feathers also take more time to fill because the tail is usually the part with the most damage due to it's use in flight. Applicants with needs which do not require a whole bird or tail feathers may apply for a pair of wings which can be filled in one year. A request for higher quality loose feathers (which typically includes 2 tail and 8 wing feathers or 10 wing feathers) can be filled in 6 months. Those applicants willing to settle for 20 miscellaneous feathers of varied species, size and type, and of lower quality, can have their order filled in 90 days.

Discussion

A. *Standing*

The Government contends, as a threshold matter, that Defendant lacks standing because he made no application for a permit to take a bald eagle and there is no indication that such an application would be categorically futile. The Tenth Circuit has recognized that where an individual never actually applied for a permit, he cannot thereafter complain that the permitting process harmed his constitutional rights. *United States v. Hardman*, 297 F.3d 1116, 1121 (10th Cir. 2002). When, however, it would have been futile for the individual to apply for a permit, he will not be denied standing to

challenge the statutory and regulatory scheme. *Id.*

In *Hardman*, the court recognized the futility of the defendants' application for permits because they could not fulfill the requirement of membership in a federally recognized tribe. Although Mr. Friday does not have the same impediment to applying for a permit, the Court likewise finds futility in the application process. The Defendant and the tribal members testifying on his behalf were not aware of the possibility of obtaining a permit to take an eagle. The statute expressly contemplates a permitting process for the taking of eagles for Indian religious purposes, relying on the Secretary of the Interior to implement regulations to make this accommodation to our Native Americans. Yet, testimony at the hearing revealed that as recently as 2003, the Secretary had not delegated the authority to process fatal take permits for Indian religious purposes. The evidence is that prior to 2003, only four such applications were submitted – three were issued and one denied. The Government's brief represents that a total of eleven such applications have been submitted of which approximately five were granted. Although the Fish and Wildlife Service utilizes outreach programs in an attempt to increase the understanding of its Repository program, there are no outreach programs advising Native Americans of the fatal take permitting process. The agency admittedly does not in any way promote the taking of eagles and prefers Native Americans to use the Repository program, despite the program's obvious inadequacies in filling their religious needs. As a result, very few applications for fatal take permits for

Indian religious purposes have been submitted and even fewer granted.¹ Based upon the agency's conduct in every other respect, it is clear that Defendant would not have been accommodated by applying for a take permit. Therefore, the Court finds that Defendant has standing to challenge the statutory and regulatory scheme.

B. Religious Freedom Restoration Act (RFRA)

"Congress enacted the Religious Freedom Restoration Act against the background of Free Exercise Clause law." *Hardman*, 297 F.3d at 1125. Substantively, RFRA states:

- (a) Government shall not *substantially burden* a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
- (b) Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person –
 - (1) is in furtherance of a compelling governmental interest; and
 - (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000bb-1(a)&(b) (emphasis added). RFRA further provides that this test may be asserted "as a claim or defense in a judicial proceeding" 42 U.S.C. § 2000bb-1(c).

1. *Substantial Burden on Religion*

Defendant argues that the BGEPA is a substantial burden on his religious

¹ One of the Government's witnesses stated that he would not be surprised that new agency employees were unaware that such take permits are available or can be applied for.

practices due to the highly restrictive method for obtaining bald eagles from the Government. The Court has already discussed the futility of the process for obtaining a fatal take permit. Moreover, there is a significant waiting period for obtaining bald eagles or eagle parts from the National Eagle Repository and, in any event, Defendant contends that eagles from the Repository are not acceptable for Sun Dance purposes. There can be no real dispute that the BGEPA substantially burdens Defendant's exercise of religion.² "The eagle feather is sacred in many Native American religions Any scheme that limits [Native Americans'] access to eagle feathers therefore must be seen as having a substantial effect on the exercise of religious belief." *Hardman*, 297 F.3d at 1126-27. Thus, this Court must consider whether the regulations governing the BGEPA: (1) advance a compelling government interest; and (2) are the least restrictive means of furthering that interest.

2. *Compelling Interests*

There can also be no real dispute, however, regarding the Government's interest in preserving our eagle populations and in protecting Native American culture. *Id.* at 1128.

The bald eagle would remain our national symbol whether there were 100 eagles or 100,000 eagles. The government's interest in preserving the

² The Government challenges whether the Defendant's actions in taking the eagle were at all related to a sincere belief in the religious practices of the Northern Arapaho Tribe. However, the un rebutted evidence before the Court is that the Defendant's Native American religious beliefs are sincerely held and his taking of the eagle was for religious purposes.

species remains compelling in either situation. *What might change depending on the number of birds existing is the scope of the program that we would accept as being narrowly tailored as the least restrictive means of achieving its interest.* Thus, we agree that the government's interest in preserving eagle populations is compelling.

Id. (emphasis added).

3. *Least Restrictive Means*

The Defendant argues that the present permitting process is not the least restrictive means of preserving the eagle populations given the recovery of the bald eagle in recent years. Despite this recovery, Defendant argues, the Government has failed and refused to issue any regulations authorizing the more liberal granting of take permits for the religious purposes of Native Americans. Defendant contends that doing so will not adversely impact the eagles. The Tribe argues that the present regulations do nothing to alleviate the burden on Indian religion created by the BGEPA. The Tribe further urges the Court to consider this burden in conjunction with the trust obligation owed by the federal government to Indians.

The Government responds that the prohibitions against taking bald eagles without a permit under the BGEPA plainly advance the compelling interest of protecting such birds. The Government further acknowledges, however, that a flat statutory ban on taking and possession of eagles would simultaneously harm the Government's interest in protecting tribal Native American religion and culture, as well as in fulfilling its general trust obligations to Indian tribes. So, to advance both interests, the BGEPA has

issued regulations which make exceptions to the flat ban for "the religious purposes of Indian tribes."

The Government maintains that any taking must be regulated, however, because unregulated take would proceed without any opportunity for agency experts to determine if then current populations, in the relevant take area, could sustain the take contemplated. It would also remove any requirement for the person taking the specimen to attest that they were doing so for religious purposes, and any opportunity for the government to accurately track the numbers of legal taking, and thus the impact on population numbers. The resulting takings, outside of the permit system review and record-keeping, also would exacerbate the black market for these birds and their parts, further motivating illegal hunting.

Further, the Court acknowledges that the demand for eagles and eagle parts for religious purposes is very high. This demand is supplied predominantly, albeit inadequately, through the National Eagle Repository. The Government argues that, although Defendant and the Tribe claim that only "clean" eagles can be used for sacrifice in the Sun Dance, between September 2004 and October 2005, six Northern Arapaho submitted applications for Repository eagle parts, most of which specifically stated that they were for use in the Sun Dance. The fact that these Native Americans were forced to settle for Repository parts does not diminish their sincerely held religious belief that a "clean" eagle is the most appropriate Sun Dance offering to God.

“The two dispositive questions under RFRA are whether application of the permitting process to [Defendant] furthers the government’s compelling interests, and whether it is the ‘least restrictive means’ of furthering those interests.” *Hardman*, 297 F.3d at 1129. The Court finds that the Government has failed to demonstrate that its policy of discouraging requests for eagle take permits for Indian religious purposes, and limiting the issuance of such permits to almost none, is the least restrictive means of advancing its stated interests in preserving eagle populations and protecting Native American culture. This is particularly so when considering the recent recovery of the species and that a more significant cause of eagle mortality is electrocution.

The Court does not disagree with the Government that some regulation of the taking of eagles is necessary to further its compelling interests. However, the present application of the permitting process is not the least restrictive means of doing so. It is not the permitting process itself that the Court finds objectionable. Rather, it is the biased and protracted nature of the process that cannot be condoned as an acceptable implementation of the BGEPA. To show deference to the agency’s implementation of the permitting process is to honor the hypocrisy of the process. Although the Government professes respect and accommodation of the religious practices of Native Americans, its actions show callous indifference to such practices. It is clear to this Court that the Government has no intention of accommodating the religious beliefs of Native Americans except on its own terms and in its own good time.

THEREFORE, it is hereby

ORDERED that the Defendant's Motion to Dismiss Information is **GRANTED** and the Information filed against Defendant is **DISMISSED**.

DATED this 13th day of October, 2006.

/s/ William F. Downes
United States District Judge